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IN THE DISTRICT COURT OF APPEAL,
FOURTH APPELLATE DISTRICT,
STATE OF CALIFORNIA

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4 Civ. 3734

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, A UTAH CORPORATION, SOLE,

Plaintiff and Appellant,

vs.

CITY OF PORTERVILLE, A MUNICIPAL CORPORATION, AND ROSS GARDNER, AS BUILDING INSPECTOR, AND HAROLD COULTHURST, AS CITY MANAGER OF THE CITY OF PORTERVILLE, A MUNICIPAL CORPORATION,

Defendants and Respondents

STATEMENT OF BASIS UPON WHICH IT IS CONTENDED THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION ON APPEAL.

Pursuant to Rule 12, Paragraph 1, of the Rules of the Supreme Court of the United States, appellant files this statement showing the basis upon which appellant contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

I

Jurisdiction

The Statute believed to sustain appellate jurisdiction is Section 237(a) of the United States Judicial Code, as amended by the Acts of February 13, 1925, Ch. 295, 43 Stat. 936; January 31, 1928, Ch. 14, 45 Stat. 54; and April 26, 1928, Ch. 440, 45 Stat. 466; Title 28 U. S. C. A. Sections 344a, 861a and 861b, superseded by Title 28 U. S. Code, Section 2201, subdivision (c).

II

The Ordinance, the Validity of Which Is Involved

The Ordinance of the City of Porterville, the validity of which is involved, was enacted under authority of Sections 6, 8 and 11 of Article XI of the Constitution of the State of California, which latter section directly confers upon municipal corporations authority "to make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws". The ordinance is City of Porterville Ordinance No. 383. The ordinance is printed and an official copy is on file with the Clerk of the City of Porterville. A copy of said zoning ordinance is attached hereto as Exhibit "A". The said zoning ordinance with respect to the erection of residences provides for four zones. R-1 (restriction of buildings to single family residences); R-2 (buildings covered by R-1 are permitted and in addition duplex or two family residences); R-3 (buildings covered by R-1 and R-2 are permitted and in addition apartment houses, hotels, boarding and lodging houses, clubs, lodges, fraternities, sororities, hospitals, etc.); R-4 (all uses in R-1-3 inclusive are permitted plus police stations, automobile stage stations, telephone exchanges, libraries, museums, schools, churches, etc.). Thus churches

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by the direct and explicit provisions of the ordinance are prohibited in the most desirable residential districts (to-wit, R-1, R-2 and R-3) and are relegated to the least desirable (to-wit, R-4), along with certain commercial and semi-commercial uses above mentioned. The petitioner's property is located in zone R-1.

III

The Date of Judgment or Decree Sought to Be Reviewed

The judgment sought to be reviewed is the decision of the District Court of Appeal, State of California, Fourth Appellate District, filed March 17, 1949. Timely petition for rehearing was filed on or about March 30, 1949 and was denied April 13, 1949. Petition for hearing by the Supreme Court of California was filed April 20, 1949 and denied May 12, 1949. This application for appeal is presented on the 17th day of June, 1949.

IV

The Nature of the Case

The petitioner, the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, a Utah corporation sole, applied to the City of Porterville, through its proper city officials, for permission to erect a church for religious worship on property owned by it located in said City of Porterville. The application and the plans and specifications of the proposed building conformed in all respects to the building code of the City of Porterville. The City of Porterville refused to issue the permit on the ground that the zoning ordinance of the City of Porterville prohibited the building of a church on the property.

The petitioner, upon the refusal of defendants to issue it a building permit, applied for a writ of mandate to the Superior Court of the State of California to compel issuance of a building permit to erect a church for religious worship,

charging violation of due process and an invasion of the freedom of religious worship. A demurrer to the petition for writ of mandate was sustained without leave to amend and judgment was entered against the petitioner. The District Court of Appeal affirmed the judgment.

The validity of the zoning ordinance was raised in the court of first instance by the pleadings which referred to the federal questions, alleging the petitioner's ownership of the property, its application for a building permit, the refusal by reason of the ordinance which was pleaded in full, and specifically calling attention to the constitutional challenge; that the ordinance is unconstitutional and void and without any substantial relation to the public health, safety, morals or general welfare, and that the ordinance "as applied to the petitioner so as to prevent it from constructing a church on said property, constitutes a deprivation of petitioner's property without due process of law in violation of . . . Section 1 of the Fourteenth Amendment of the Constitution of the United States" (Clerk's Tr. pp. 1-6). The federal question was further raised by oral argument in opposition to the demurrer to the petition for writ of mandate. In the argument on demurrer, counsel for defendants argued in part:

> "Now, it is best we read the Complaint. We gather that the sole legal attack made in this case upon the action of the City of Porterville in standing upon its ordinance and denying a building permit for a structure and the uses attached thereto which are not permitted in that Zone is on the proposition that any ordinance which purports to assign a specific portion of the residential area for the uses of churches and public buildings by city churches, is therefore, and because of that fact, unconstitutional and void." (Rep. Tr. p. 7, lines 17 to 25)

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At that time, counsel for plaintiff and appellant argued:

> "Mr. Harmon: Now, if your Honor please, we take it on general Demurrer, we take is as correct, the proposition that Counsel has made, that this case rests squarely on the general issue as to whether or not a church can be thus zoned against. There will be facts brought in later on in the hearing on the merit, to disclose this arbitrary and unreasonableness, in our opinion, which are additional grounds and apart and aside from the fact, it is our contention right now, raised squarely, that a Zone ordinance which restricts churches from a residence area is unconstitutional * * *." (Clerk's Tr. p. 26, line 21 to p. 27, lines 1 to 4)

The constitutional question was the only question urged and the court of first instance, in sustaining the demurrer without leave to amend, stated in part:

> "It is the conclusion of the Court that the ordinance is reasonable and not discriminatory, reasonable exercise of police power and I think that the Demurrer should be sustained. I expect, of course, no matter what the decision of the Court is, that the case will be carried to the higher court and I think the record is such that everything is before the Court which would be necessary for a ruling by the higher court and for the [that] reason the ruling will be that the Demurrer will be sustained, without leave to amend, that the alternative Mandate, that the Petition for Writ of Mandate be denied and Alternative Writ be discharged." (Rep. Tr. p. 84, lines 5-15)

The federal question was raised in the District Court of Appeal of the State of California, Fourth Appellate District, in appellant's opening and closing briefs. The appellant's position in the District Court of Appeal was as follows:

> "Specifically, therefore, the question to be decided by the court is the validity of the Porterville zoning

statute as applied to prevent the appellant from constructing a church on its property * * *.

"It is appellant's position that this zoning Ordinance as applied to appellant to prevent its construction of a church for religious worship upon its property is invalid because it is in violation of the State and Federal Constitutions (see Section 13, Article I, California Constitution; see also Article I, Section 4, California Constitution; Section I, Fourteenth Amendment U. S. Constitution) on two grounds, each of which is sufficient alone to invalidate the ordinance: First, it is submitted that the Porterville zoning ordinance as so applied is invalid because it bears no substantial relation to the public health, safety, morals and general welfare, and thus is beyond the police power of the State to enact. Second, the ordinance is invalid because the application of the ordinance to petitioner results in a restriction of religious worship in the absence of any grave or imminent danger justifying such restriction."

The points argued by appellant in its opening brief before the District Court of Appeals were as follows:

1. The Porterville zoning ordinance is invalid because it has no substantial relation to the public health, safety, morals or general welfare.

2. The Porterville ordinance is invalid because there was no grave or immediate danger justifying restriction of churches in residential districts.

The District Court of Appeal ruled adversely to the appellant on both points. It ruled that the Porterville zoning ordinance was not unconstitutional in that it bore a substantial relation to the public health, safety, morals and general welfare, and ruled further that it was not an unwarranted restriction of religious worship. Copies of the opinion of the court of first instance and of the opinion of the District Court of Appeal above referred to are attached hereto as Exhibits "B" and "C" respectively.

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V

The Cases Relied upon Believed to Sustain Jurisdiction

Where the state court of final resort in the case has entertained the question as to whether a state statute (or ordinance as the case may be) is repugnant to the Constitution of the United States and held that such statute was not repugnant and that the statute was valid, the Supreme Court of the United States has jurisdiction by appeal to review the decision of said state court.

People of the State of New York ex rel. Bryant v. *Zimmerman,* 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184;

Green Bay & M. Canal Co. v. *Patten Paper Co.,* 172 U. S. 58, 19 S. Ct. 97, 43 L. Ed. 364;

St. Louis I. M. & S. R. Co. v. *Starbird,* 243 U. S. 592, 37 S. Ct. 462, 61 L. Ed. 917;

Whitney v. *California,* 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095;

Wilson v. *Cook,* 66 S. Ct. 663, (Decided March 4, 1946).

VI

Grounds upon Which It Is Contended the Questions Involved Are Substantial

The District Court of Appeal of the State of California, in concluding that the ordinance of the City of Porterville (prohibiting the construction of churches in residential districts) "bears a substantial relation to the public health, safety, morals and general welfare because it tends to promote and perpetuate the American home and protect its civil and social values," ruled said ordinance valid despite the constitutional guarantee of due process. This it is believed was erroneous and it is contended that such ruling presents a substantial federal question. The appellate courts of other

states which have dealt with similar ordinances have in all instances held such ordinances unconstitutional as violative of due process.

City of Sherman v. *Sims* (Texas), 183 S. W. (2d) 415, Aff'g 181 S. W. (2d) 100;
Ellsworth v. *Gercke* (Ariz.), 156 Pac. (2d) 242;
Roman Catholic Archbishop v. *Baker* (Ore.), 15 P. (2d) 391;
State ex rel. Roman Catholic Bishop v. *Hill* (Nev.), 90 Pac. (2d) 217;
State ex rel. Synod of Ohio v. *Joseph* (Ohio), 39 N. E. (2d) 515, 138 A. L. R. 1274.

It is further contended that a substantial federal question is involved inasmuch as it is believed that the ordinance does in effect restrict the freedom of religious worship. If so, then such ordinance was invalid unless there was a grave or immediate danger to interests which the state might protect under its police power.

Marsh v. *Alabama*, 326 U. S. 501, 90 L. Ed. 265;
West Virginia State Board of Education v. *Barnette*, 319 U. S. 624, 87 L. Ed. 1628;
Hendley v. *State*, 141 Pac. (2d) 118.

To summarize, briefly, it is contended that the state court's decision upholding the ordinance which bars the construction of churches in the most desirable residential sections of the city and relegates them with semi-commercial institutions to the least desirable residential sections, involves substantial federal questions, viz.:

(a) Such restriction has no substantial relation to the public health, safety, morals and general welfare and thus constitutes the taking of property in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

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(b) Such restriction resulted in an unwarranted restriction of religious worship in violation of Section 1 of the Fourteenth Amendment protecting the freedom of liberty.

Dated this 17th day of June, 1949.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
By JOHNSON, HARMON, STIRRAT & HENDERSON,
Its Attorneys.

APPENDIX

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

Civil No. 3734

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (a Utah Corporation Sole), *Plaintiff and Appellant,*

vs.

CITY OF PORTERVILLE (a Municipal Corporation), et al., *Defendants and Respondents*

OPINION

This appeal is from a judgment dismissing plaintiff's petition for writ of mandate. The judgment was based on an order sustaining the demurrer of defendants to the petition without leave to amend, dismissing the same and quashing the alternative writ of mandate theretofore issued.

The plaintiff, by its petition for a writ of mandate, sought to compel the defendants to issue a permit for the construction of a church on property owned by plaintiff in the city of Porterville. Plaintiff alleged that its application to erect a church upon its property was duly filed with the proper city officials and that defendant city building inspector refused to issue a permit for the erection of the church on the ground that the property involved was zoned by the city solely for the erection of single family dwellings.

A copy of the zoning ordinance of the city of Porterville was attached to the petition. By its provisions, as far as applicable here, the city was zoned as follows: R-1, wherein buildings are restricted to single family residences; R-2, to duplex or two-family residences; R-3, to multiple residences, and R-4, to permit unlimited residences. In R-1, only single family dwellings may be erected; in R-2, there are permitted all uses that are permitted under R-1, plus duplexes and two-family residences; in R-3, all uses of R-1

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and R-2 are permitted, plus apartment houses, multiple family dwellings, hotels, boarding and lodging houses, clubs, fraternities, sororities, hospitals, etc. In R-4 called "unlimited residence," all uses of the preceding zones are permitted, plus libraries, museums, schools, churches and religious institutions, etc.

At the time the property was acquired by plaintiff it was partly within the city and thereafter was taken within the city limits and included in an area limited in its use to single family dwelling units, being zone R-1. Plaintiff's application for a building permit stated that the use and occupancy to which the building was to be put was "to provide a chapel and classrooms for religious worship and study and accommodations for youth activities and other church activities."

Plaintiff's contention is that the zoning ordinance as applied to plaintiff to prevent its construction of a church for religious worship upon its property is invalid because, as so applied, it bears no substantial relation to the public health, safety, morals and general welfare and thus is beyond the police power of the state to enact, and further, because the application of the ordinance to petitioner results in a restriction of religious worship in the absence of any grave or imminent danger justifying such a restriction. The precise question of whether or not there may be established, as a part of a comprehensive zoning plan, strictly private residential districts from which churches are excluded and in which they are prohibited, has apparently not been decided in this state; however, it has been held that general business enterprises, apartments, tenements and like structures may be excluded and prohibited in private residential districts. (Miller *v.* Board of Public Works, 195 Cal. 477, 490 [234 P. 381, 38 A.L.R. 1479].) As was said in Wilkins *v.* City of San Bernardino, 29 Cal. 2d 332, 337 [175 P.2d 542]:

"It is well settled that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power, and that the establishment, as part of a comprehensive and systematic plan, of districts devoted to strictly private residences or single family

dwellings, from which are excluded business or multiple dwelling structures, is a legitimate exercise of the police power. See Jones *v.* City of Los Angeles, 211 Cal. 304, 307 [295 P. 14]; Miller *v.* Board of Public Works, 195 Cal. 477, 490 [234 P. 381, 38 A.L.R. 1479]. • • • Every intendment is in favor of the validity of the exercise of police power, and, even though a court might differ from the determination of the legislative body, if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, the zoning measure will be deemed to be within the purview of the police power. (Citing cases.)"

In Miller *v.* Board of Public Works, supra, at page 492, it was said:

"There are some decisions which do not uphold the validity of a zoning ordinance establishing strictly residential districts. We are of the opinion, however, that the better reasoned cases are in favor of the validity of comprehensive zoning which establish strictly private home districts, and that the most which can be said of the cases to the contrary is that they merely show that this is a question upon which reasonable minds may differ."

We are in accord with this view and we conclude that since the city had power to zone the property herein affected, strictly for single family dwellings, there was no abuse of the power in prohibiting the erection and construction of church buildings therein. It is a matter of common knowledge that people in considerable numbers assemble in churches and that parking and traffic problems exist where crowds gather. This would be true particularly in areas limited to single family dwellings. There necessarily is an appreciable amount of noise connected with the conduct of church and "youth activities." These and many other factors may well enter into the determination of the legislative body in drawing the lines between districts, a determination primarily the province of the city.

A single family residence may be much more desirable when not in an apartment house neighborhood or adjacent to a public building such as a church. The municipal legis-

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lative body may require that church buildings be erected to conform to health and safety regulations as provided in its building code and we see no reason to hold that churches may be erected in a single family residential area when a duplex, triplex, or other multiple dwelling can lawfully be excluded therefrom. The provision in the ordinance for a single family residential area affords an opportunity and inducement for the acquisition and occupation of private homes where the owners thereof may live in comparative peace, comfort and quiet. Such a zoning regulation bears a substantial relation to the public health, safety, morals and general welfare because it tends to promote and perpetuate the American home and protect its civic and social values.

We find no merit in plaintiff's contention that the application of the ordinance to the plaintiff results in an unwarranted restriction of religious worship. The petitioner is not a congregation, but holds its property as a corporation sole, the existence of which depends upon the laws of the state. Having such right from the state, the enjoyment of the property is subject to reasonable regulations. The denial of a building permit did not prohibit anyone from religious worship and there is nothing in the record before us to indicate that the church building could not be erected if located in the area zoned for that purpose.

The petition fails to state a cause of action in that the facts alleged do not show that the ordinance in question is unreasonable and void as applied to plaintiff. The allegations are:

"That said zoning ordinance as applied to your petitioner so as to prevent your petitioner from erecting a church on the above mentioned property, is unconstitutional and void, in that said ordinance is arbitrary and unreasonable and is without any substantial relation to the public health, safety, morals or general welfare; that said ordinance is not based upon a finding by the governing body of the city of Porterville that such zoning is necessary to the public health, safety, morals or general welfare of the community. That said ordinance * * * is not based on the general welfare of the community and does not tend to preserve or pro-

mote the public health, safety, or morals, and constitutes an arbitrary exclusion of a church, * * * That said ordinance * * * constitutes a deprivation of petitioner's property without due process of law. * * *"

Matters of fact necessary to support the legal conclusions alleged are not stated, and the petition therefore states no cause of action. (Wilkins *v.* City of San Bernardino, supra, p. 344.)

The burden is upon the plaintiff to allege and prove physical facts from which the court could conclude as a matter of law that the ordinance was unreasonable and invalid. (Wilkins *v.* City of San Bernardino, supra, p. 338.)

In enacting zoning ordinances, the municipality performs a legislative function and every intendment is in favor of the validity of such ordinances. (Jardine *v.* City of Pasadena, 199 Cal. 64, 72-73 [248 P. 225, 48 A.L.R. 509].) It is presumed that the enactment as a whole is justified under the police power and adapted to promote the public health, safety, morals, and general welfare. (Lockard *v.* City of Los Angeles,[1] 33 Cal. 2d —, — [202 P.2d 38].)

There is reasonable justification for the action of the defendant city in prescribing the buildings which may be erected and constructed in the zone established for single family residences and in such cases the wisdom of the prohibitions and restrictions is a matter for legislative determination. (Lockard *v.* City of Los Angeles, supra, p. 435.)

Plaintiff argues that the trial court should not have sustained the demurrer to the petition without leave to amend. The plaintiff, however, did not request leave to amend and the judgment contains a recital that petitioner "advised the Court that leave to amend would be futile." Plaintiff's contention in the trial court was as stated in its reply brief—"That the prohibition of churches in virtually all residential zones is on its face not a proper exercise of the police power, and that it violates the constitutional immunity of freedom of religious worship."

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[1] Advance Report Citation: 33 A.C. 427, 434.

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Where, as here, plaintiff elected to stand on the allegations of the petition, and declined to amend it, informing the court that amendment would be "futile," it cannot be held that there was an abuse of discretion in the ruling of the trial court.

Judgment affirmed.

MUSSELL, J.

Barnard, P. J., and Griffin, J., concurred.
Filed March 17, 1949, E. J. Verdeckberg, Clerk.

(3851)